

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1726

COMMONWEALTH

vs.

ANGEL ROSARIO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial in the Superior Court, the defendant, Angel Rosario, was convicted of assault by means of a dangerous weapon (firearm), G. L. c. 265, § 15B (b); unlawful possession of a loaded firearm, G. L. c. 269, § 10 (n); and unlawful possession of a firearm, G. L. c. 269, § 10 (a). Thereafter, the defendant pleaded guilty to so much of the unlawful possession of a firearm indictment that charged him with being a career criminal (amended to level one), G. L. c. 269, § 10G (a). The defendant appeals, arguing that the evidence was insufficient and that the verdicts against him were "illogical," based on his codefendant being acquitted. We affirm in part and reverse in part.

Background. The jury could have found the following facts. In the early morning hours of August 15, 2016, the defendant and

the codefendant, Walter Borrero, were at the apartment of the defendant's niece, M.L., which was located in a housing authority complex in Worcester. M.L. heard banging on her door. When she opened it, no one was there, which made her "nervous." She went outside and noticed a group of people standing to the left of her building, including one male dressed in black and wearing a black "hoodie." M.L. returned to her apartment and called her aunt, D.S., asking her to pick up the defendant.

When D.S. arrived, she also noticed the group of people standing to the left and that one was wearing a "hoodie." According to M.L., neither the defendant nor Borrero had anything in his hands when he left M.L.'s apartment. D.S. testified that as the defendant was walking out to the car, she did not see any weapon in his hands. As the defendant and Borrero left the apartment, they got into an argument with the group outside the building. M.L. then heard three or four loud sounds, which she described sounded like firecrackers, and then she saw "everybody just disappear[]." D.S. heard "popping sounds" and yelled at the defendant, "Let's go." The defendant and Borrero ran to D.S.'s car and they left.

At around 1 A.M. that morning, Worcester Police Officer Michael LaHair responded to M.L.'s apartment for reports of gunshots being fired. LaHair and other officers searched the area for shell casings and victims, but did not find anything.

Worcester Police Detective Ronald Remillard investigated the incident. Remillard testified that the reason that no shell casings were found in the area would be due to either a revolver having been fired or the casings ejected by a semiautomatic weapon had been picked up.

Three surveillance video recordings (videos) from different cameras at the housing authority complex were entered in evidence. One of the videos, which was in color, was from a camera located at the front of M.L.'s building, and showed a car parking, and the defendant and Borrero walking out of the building toward the car. The defendant is seen looking to his right. As the defendant began moving toward his right, Borrero grabbed the defendant's arm. People are then seen fleeing. The defendant then moved out of the camera's sight. A few seconds later, the defendant, along with Borrero, came back in view, and ran to and quickly entered the parked car, which sped away. A second video, which was in black and white, was from a camera located at the rear of M.L.'s building, and showed a group of males standing to the left in back of the building. These males suddenly fled at the same time that the defendant is seen standing near that area. Borrero is seen grabbing the defendant by the arm and pulling him away. The defendant and Borrero then fled. A third video, taken from a camera located across the

street from M.L.'s building, showed Borrero grabbing the defendant and pushing him back as people fled the area.

Discussion. 1. Sufficiency of the evidence. a. Firearm convictions. We review the defendant's sufficiency of the evidence claims in the light most favorable to the Commonwealth to "determine 'whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt'" (citation omitted). Commonwealth v. Grandison, 433 Mass. 135, 140 (2001). Here, the defendant claims that the evidence was insufficient to establish that he possessed a firearm, and that, since no firearm or casings were found, there was insufficient evidence to establish the barrel length of any alleged firearm. We agree with the latter of the defendant's arguments.

In order to convict the defendant of unlawful possession of a firearm (whether or not loaded), the Commonwealth had the burden of proving that he possessed a firearm as the term is defined by G. L. c. 140, § 121. See Commonwealth v. Nieves, 43 Mass. App. Ct. 1, 2 (1997). The statute defines a firearm as a weapon "from which a shot or bullet can be discharged and of which the length of the barrel . . . is less than [sixteen] inches." G. L. c. 140, § 121. Although the Commonwealth's burden is "not a heavy one," the Commonwealth must "present some competent evidence from which the jury reasonably can draw

inferences that the weapon will fire" and that "it ha[s] a barrel less than sixteen inches." Nieves, supra. See Commonwealth v. Loadholt, 456 Mass. 411, 431 (2010), S.C., 460 Mass. 723 (2011). In cases such as this one, where there is no gun or ballistics evidence, operability and barrel length may be proven by "witness testimony and related circumstantial and corroborative evidence." Commonwealth v. Drapaniotis, 89 Mass. App. Ct. 267, 271 (2016). See Commonwealth v. Tuitt, 393 Mass. 801, 810 (1985) (expert testimony not needed to establish definitional prerequisites of firearm).

Here, the Commonwealth failed to establish beyond a reasonable doubt that the defendant possessed a weapon with a barrel length of less than sixteen inches. No gun or shell casings were discovered and there was no "witness testimony" or "other related circumstantial evidence" describing the weapon or its barrel length. Drapaniotis, 89 Mass. App. Ct. at 271. See Commonwealth v. DeJesus, 44 Mass. App. Ct. 349, 351-352 (1998) (reversing conviction for illegal possession of firearm where no evidence of weapon's barrel length). Contrast Commonwealth v. Housewright, 470 Mass. 665, 680 (2015) (although no gun, casings, or bullets found, witnesses' testimony that defendant loaded and fired weapon that looked, sounded, and flashed like gun held sufficient); Commonwealth v. Naylor, 73 Mass. App. Ct. 518, 519, 525 (2009) (where no gun recovered, victims' testimony

that shots fired from window of one of two vehicles in close proximity to each other and lack of any statement by victims of having seen gun's barrel held sufficient to establish that shooter fired firearm). As the evidence was insufficient to establish the weapon's barrel length as required by § 121, the firearm convictions must be reversed.<sup>1</sup>

b. Assault by means of a dangerous weapon. The defendant also claims the evidence was insufficient to convict him of assault by means of a dangerous weapon (ADW).<sup>2</sup> We disagree. Among other things, the Commonwealth proceeded on a threatened battery theory of assault, and the judge so instructed the jury. See Commonwealth v. Porro, 458 Mass. 526, 530-531 (2010) (under threatened battery theory, Commonwealth must prove defendant engaged in conduct that reasonable person would recognize as threatening, defendant intended to cause fear of imminent battery, and victim perceived defendant's threat). Based on the testimony and video, the jury could have found that the defendant began arguing with the group located outside M.L.'s building. As the defendant moved toward that group, Borrero

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<sup>1</sup> In view of our decision, we need not comment on the defendant's remaining claims of the sufficiency of the evidence as to the firearm convictions.

<sup>2</sup> Although not raised by the parties, we note that there is no named victim in the ADW indictment. This does not provide the defendant with a ground for acquittal as the victim's name is not an essential element of the crime. See Commonwealth v. O'Connell, 432 Mass. 657, 660 (2000).

grabbed the defendant's arm as everyone in the group quickly fled the area. In addition, both M.L. and D.S. testified that, at that time, they heard sounds described as firecrackers or popping. M.L. further testified that after she heard those sounds, she saw "everyone just disappear[]." The Commonwealth was required to prove that a dangerous weapon was used, however, the inclusion of "firearm" in the indictment is not an element of the crime. See Commonwealth v. Salone, 26 Mass. App. Ct. 926, 930 (1988) ("The language in the indictment specifying the particular [dangerous] weapon used [was] superfluous"). Viewed in the light most favorable to the Commonwealth, the evidence was sufficient to permit the jury to find that the defendant intended to place the members of the group in fear of an imminent battery; that the defendant, using a dangerous weapon, engaged in conduct that a reasonable person would recognize as threatening; and that the members of the group did in fact fear that the defendant would harm them. See Grandison, 433 Mass. at 140.

2. Illogical verdicts. The defendant next argues that, based on the jury acquitting Borrero of the same charges, the verdicts against him were "illogically arrived at by the jury." We disagree. In criminal cases, there is a well-established rule that "mere inconsistency in verdicts, one of which is an acquittal, will not render the verdict of guilty erroneous"

(citation omitted). Commonwealth v. Medeiros, 456 Mass. 52, 57 (2010). See Commonwealth v. Wood, 469 Mass. 266, 293 (2014). In reviewing such cases, "we decline to disturb the jury's guilty verdicts provided there is sufficient evidence to support them." Medeiros, supra at 57-58. The evidence was sufficient to convict the defendant of ADW, and no more was required. Moreover, we note that here there was also evidence -- for example, Borrero's evident efforts to hold the defendant back -- which would explain the jury's decision to distinguish between the defendants.

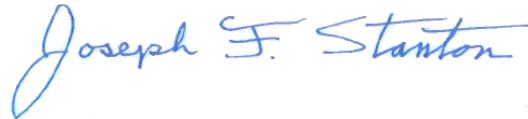
3. Resentencing. Based on the firearm convictions being reversed, the matter is to be remanded for the judge to have the opportunity to reconsider the sentence for the ADW conviction. Cf. Commonwealth v. Simmons, 65 Mass. App. Ct. 274, 280 (2005) ("If the conviction on which the sentence is imposed is reversed on appeal, the conviction on the less severe charge is available to be brought forward in order to provide an alternative basis for sentencing").

Conclusion. On the indictments charging unlawful possession of a loaded firearm and unlawful possession of a firearm, and on the indictment charging being a career criminal, the judgments are reversed, the verdicts and findings are set aside, and judgments shall enter for the defendant. On the

indictment charging ADW, the verdict shall stand, the sentence is vacated, and the case is remanded for resentencing.

So ordered.

By the Court (Wolohojian,  
Blake & Englander, JJ.<sup>3</sup>),



Clerk

Entered: November 25, 2019.

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<sup>3</sup> The panelists are listed in order of seniority.